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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 643

JAMES A. NOE, HARRY ALSMAN, RAYMOND F. HULTT, and JAMES A. NOE, JR., doing business as JAMES A. NOE AND COMPANY, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*,

LOYOLA UNIVERSITY, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT BELOW IN OPPOSITION TO ISSUANCE OF THE WRIT

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix pp. 1a-9a) is reported at 260 F. 2d 739. The decision of the Federal Communications Commission granting the construction permit to Loyola University (J.A. 377-542) was released July 13, 1956, and is reported at 12 Pike & Fischer, Radio Regulation 1017. A Memorandum Opinion and Order of the Federal Communications Commission that de-

nied petitions for rehearing (J.A. 543-551) was released July 1, 1957, and is reported at 12 Pike & Fischer, Radio Regulation 1116a.

JURISDICTION

The jurisdictional considerations are set forth in the Petition, page 2.

QUESTION PRESENTED

The question presented is whether or not Loyola University, by reason of its connection with the Society of Jesus, is the representative of an alien or is a corporation whose stock is owned of record or voted by representatives of aliens, within the meaning of Section 310(a) of the Communications Act of 1934, 48 Stat. 1086 (1952), as amended, 47 U.S.C., § 310(a), and therefore rendered ineligible to hold a television license. The statute involved is set forth in the Petition, pages 2 and 3.

STATEMENT

Loyola University, James A. Noe and Company, and The Times-Picayune Publishing Company were three separate applicants for the same television facility in New Orleans, Channel 4. Because of mutual exclusivity of the applications, the FCC designated the three applications for a comparative hearing to determine which applicant would best serve the public interest, convenience, and necessity. At the time of the hearing, each of the applicants had a license from the FCC for one or more broadcast facilities in the State of Louisiana. In the case of James A. Noe and Company, it was Mr. Noe who was the licensee of a standard broadcast (radio) station in New Orleans. The Times Picayune

Publishing Company and Loyola University each was the licensee of a standard broadcast station in New Orleans. Therefore, the past broadcast records of each applicant played an important part in the comparative determination as to which one of them would best serve the public interest.

Loyola University has operated a commercial broadcast station in New Orleans since 1922. The FCC determined that Loyola University had a past broadcast record superior to either of the other applicants. Past performance of an applicant has been one of the most important criteria used by the FCC to evaluate promises of applicants for new facilities. In the case of Loyola, it was the same corporate entity, Loyola University, a Louisiana corporation, which had held licenses for standard broadcast station WWL for many years, that was applying for a construction permit for a television station. The applicants competing with Loyola University argued that, as a comparative matter, Loyola University suffered because of its organizational characteristics as an educational institution. The FCC considered the alleged comparative demerits and the argument submitted. Additionally, the FCC considered the argument which the petitioner now attempts to use as the grounds for a petition for certiorari. The FCC held that Loyola University was not within that class of persons and entities proscribed from holding a license from the FCC under Section 310(a) of the Communications Act.

Loyola University is a corporation duly established by the laws of the State of Louisiana, domiciled in New Orleans. The University's history dates back to the middle part of the Nineteenth Century (R. 245). Its present charter dates back to 1912.

Loyola University is governed by its Board of Directors, all of whom are native-born citizens of the United States. The record is devoid of any fact which could tend to show any external control, at any time, over a director or officer. There are four corporate officers —a President, Vice-President, Secretary, and Treasurer. Under the present charter, which was filed as part of Loyola's application, each of the officers and directors must be a member of the Society of Jesus. The Court of Appeals for the District of Columbia Circuit recognized the ecclesiastical organization of the Society of Jesus as it pertains to this case. However, the Court found that the record shows that this chain of religious authority has never been used to impinge upon the independence of the University in the operation of its radio station.

ARGUMENT

The petitioner contends that this case presents an important question regarding foreign influence in communications which has not been settled by this Court. Loyola University maintains that there is no "foreign influence" in the record. Petitioner maintains this case is different from other cases involving religious organizations as licensees of the FCC. The only difference in this case is that it would appear that the Catholic religion is involved rather than some other religion. Petitioner maintains that the legal issue here is no different than an instance of a corporate creation of a labor organization, having a majority of members outside of the United States, applying for a facility from the FCC. This comparison is hardly apt. The only points in common among members of the Jesuit Order deal with religious obliga-

tions. This religious connection, in spiritual matters, is of no concern to the civil law of the United States.

The applicant here is Loyola University, a corporation of the State of Louisiana. All of its officers and the members of its Board of Directors are native-born citizens of the United States. As a non-profit corporation, having no stock, control over the corporation is vested in the Board of Directors. The Board of Directors votes the only stock interest that the Loyola corporation could be deemed to have. The fact that each of the members of the Board of Directors belongs to a religious organization which has or could have a majority of members outside the United States is no more in point than the fact that a member of the Rotary International belongs to an organization of which the majority of members are not United States citizens. Petitioner goes too far when he maintains by implication that this case, as decided by the Court of Appeals, stands for the proposition that ownership and control of facilities licensed by the FCC can be in the hands of non-citizens. As pointed out, the facility in question herein is in the hands and in the control of a Louisiana corporation, not a group of aliens non-resident in the United States.

The FCC made findings that the Society of Jesus has no control over the television station proposed by Loyola University. Petitioner seeks to attack the findings made by the FCC without showing error. This cannot be done in this Court because of the inclination of all courts to give great weight to any Commission finding on the question of control. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 83 L. ed. 1147.

Petitioner maintains that the Court of Appeals has judicially legislated an amendment to Section 310 (a) of the Communications Act. This is not the case and no reading, however strained, can warrant this conclusion.

Petitioner misinterprets the argument of the intervenor at pages 9 and 10 of the intervenor's brief before the Court of Appeals. In the petition, Noe argues, pp. 13-14, that the intervenor did not maintain that the Congressional purpose in the enactment of Section 310 (a) was limited to prevention of alien activities against the Government during time of war. The petitioner has overlooked the argument of intervenor set forth at page 8 of the intervenor's brief before the Court of Appeals:

> "The provisions of Section 310 (a) have a very precise significance derived from the nature of the communications enterprises of the United States. No country, so far as is known, permits ownership of its communications by non-citizens. This concept is inherent in the very nature of the *search for national security.*" (emphasis supplied)

The argument of the petitioner breaks down in that nothing in the record shows that the members of the Board of Directors of Loyola University, a Louisiana Corporation, are representatives of aliens. Petitioner confuses religious beliefs with civil authority. The discipline and hierarchical control, referred to by petitioner, page 19, relate to religious matters only. Petitioner maintains that, even if the Superior General of the Jesuit Order were an American citizen, the fact that less than half of the total membership of the Jesuit Order are American citizens would militate against a grant of the license to Loyola University because of a

"predominantly foreign complexion of the Order given by its membership". It is the Petitioner's argument that the Society of Jesus, headed by the Superior General, is the applicant for this facility rather than a Louisiana corporation, all of whose officers and directors are natural-born citizens of the United States. The argument made by petitioner has no basis in fact.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit is correct. No important issue is presented for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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